92-634

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1992

STATE OF ALABAMA,

PETITIONER,

v.

McRAY GINGO, and
ATLAS INDUSTRIAL PAINTERS, INC.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION OF THE STATE OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

WILLIAM DUNCAN LITTLE, III*
ROBERT DOUGLAS TAMBLING

ASSISTANT ATTORNEYS GENERAL

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DECISION OF THE SUPREME COURT OF ALABAMA CREATING AN EXCEPTION TO THE DOCTRINE OF ARIZONA v. YOUNGBLOOD IS CONTRARY TO CALIFORNIA v. TROMBETTA AND TO THE APPLICATION OF BOTH YOUNGBLOOD AND TROMBETTA BY THE COURTS OF VARIOUS JURISDICTIONS?

II. WHETHER THE DECISION OF THE SUPREME COURT OF ALABAMA REGARDING THE DESTRUCTION OF EVIDENCE IN THE HANDS OF A SEPARATE GOVERNMENT CONFLICTS WITH THOSE OF OTHER JURISDICTIONS ON THIS QUESTION?

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PETITION FOR A WRIT OF CERTIORARI
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OPINIONS AND ORDERS BELOW

The Order of the Circuit Court of Shelby County, Alabama, suppressing test results based on waste samples obtained by the Alabama Department of Environmental Management (ADEM) and the United States Environmental Protection Agency (EPA), is not reported, but a copy of this order accompanies this petition as Appendix A.

The decision of the Court of Criminal Appeals of Alabama reversing the order of the Circuit Court of Shelby County is not yet reported, but a copy of this decision accompanies this petition as Appendix B.

The decision of the Supreme Court of Alabama reversing the decision of the Court of Criminal Appeals is not yet reported, but a copy of this decision accompanies this petition as Appendix C. The denial by the Supreme Court of Alabama of Petitioner's application for rehearing is not reported, but a copy of it accompanies this petition as Appendix D.

JURISDICTION

The decision of the Supreme Court of Alabama was issued on April 17, 1992. A timely application for rehearing filed by the State of Alabama was denied on July 10, 1992, and this petition is filed within 90 days of this date. This Honorable Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1, Amendment XIV, U.S. Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities

> of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding.

STATEMENT OF THE CASE

Respondents were indicted in November 1988 by the Grand Jury of Shelby County, Alabama, for illegally disposing of hazardous waste; for illegally violating an order of the Alabama Department of Environmental Management (ADEM) regarding disposal of hazardous waste; and also for unlawfully failing to prepare a manifest for transportation of hazardous waste, all in violation of

Code of Alabama 1975, §22-30-19.[1] In February 1989, Respondent McRay Gingo filed a motion for production and disclosure requesting "any and all tangible evidence in the State's possession, care, custody or control relating to or consisting of ... paint, hazardous waste, sludge, drums, ..." After this motion was granted, the State advised the defendants in writing that the samples of hazardous waste which had been collected by ADEM no longer existed.

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[1]A third defendant, Robert D. White, was also indicted for related violations of Code of Alabama 1975, §22-30-19. White was a party in the Alabama Court of Criminal Appeals but did not file a petition for writ of certiorari in the Supreme Court of Alabama.

On September 4, 1990, the State of Alabama filed a motion for pretrial determination of the admissibility of evidence, in anticipation that at some point Respondents would object to the introduction into evidence of the laboratory test results on the ground that the underlying samples were not preserved for independent testing and analysis by Respondents.

On October 12, 1990, a hearing was held on the State's motion. At this hearing it was established that the ADEM samples had been destroyed in late April or early May, 1987. Furthermore, separate samples taken by the United States Environmental Protection Agency (EPA) for its own purposes and maintained in its custody and control

were destroyed in August 1989. On February 22, 1991, the Circuit Court of Shelby County entered an order finding no bad faith in the destruction of either set of samples but nonetheless suppressing the test results from both sets of samples (see Appendix A). While the trial court did not specify the basis for its decision, the briefs for both sides addressed the question of whether destruction of the samples violated the Due Process Clause of the 14th Amendment. This decision was appealed pretrial to the Court of Criminal Appeals of Alabama.

On November 27, 1991, the Court of Criminal Appeals reversed the decision of the Circuit Court, holding that because there was no bad faith in the

destruction of either set of samples there was no violation of the Due Process Clause of the 14th Amendment and the test results were admissible (see Appendix B). After rehearing was denied, Respondents filed a petition for writ of certiorari in the Supreme Court of Alabama, which petition was granted.

On April 17, 1992, the Supreme Court of Alabama reversed the decision of the Court of Criminal Appeals. The Supreme Court of Alabama agreed that there was no bad faith in the destruction of either set of samples, but recognized an exception to the doctrine of Arizona v. Youngblood, 488 U.S. 51 (1988), based upon the critical nature of the evidence destroyed. The

Supreme Court of Alabama thus held that the destruction of the samples violated the Due Process Clause of the 14th Amendment, and suppressed the test results as to both the ADEM samples and the EPA samples, even though the EPA samples were never in the State's possession (Appendix C). On July 10, 1992, the Supreme Court of Alabama denied Petitioner's application for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF ALABAMA CREATING AN EXCEPTION TO THE DOCTRINE OF ARIZONA v. YOUNGBLOOD IS CONTRARY TO CALIFORNIA v. TROMBETTA AND TO THE APPLICATION OF BOTH YOUNGBLOOD AND TROMBETTA BY THE COURTS OF VARIOUS JURISDICTIONS.

In the case at bar, the Supreme Court of Alabama has unilaterally created an exception to the rule of Arizona v. Youngblood, 488 U.S. 51 (1988), that a defendant must prove bad faith on the part of the prosecution in the loss or destruction of potentially exculpatory evidence in order to establish a violation of due process. In so holding, the lower court has held contrary to California v. Trombetta, 467 U.S. 479 (1984), upon which

Youngblood was based. Furthermore, the Alabama Supreme Court's decision in this case is inconsistent with the application of Youngblood and Trombetta by courts in various federal and state jurisdictions.

This case involves a prosecution for various illegal acts regarding hazardous waste. Prior to trial Respondents moved for production of all tangible evidence within the possession of the State. The State subsequently notified Respondents that the samples of the hazardous waste had been destroyed. The trial court, in a pretrial ruling, suppressed the test results as to the samples collected by the Alabama Department of Environmental Management (ADEM) and separate samples collected by the United States Environmental Protection Agency (EPA) and

maintained by EPA. This decision by the trial court was eventually upheld by the Supreme Court of Alabama.

In its ruling the Alabama Supreme Court recognized the general rule of Arizona v. Youngblood, supra, that a defendant must establish bad faith before the loss or destruction of potentially exculpatory evidence will be considered a due process violation. The lower court, however, created on its own an exception to the Youngblood rule in this case, based on the following language in the concurring opinion in Youngblood of Justice Stevens.

> In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so

> critical to the defense as to make a criminal trial fundamentally unfair.

488 U.S. at 61 (concurring opinion, Stevens, J.) The Alabama Supreme Court held in effect that because proving the hazardous nature of the waste was the heart of the State's case, the destruction of the samples was fundamentally unfair, and thus the case fit the exception recognized by Justice Stevens. Ex parte McRay Gingo, No. 1910360 (Ala. April 17, 1992), ms. op. at 6-10 (Appendix C at 31-33.

This holding by the lower court is contrary to California v. Trombetta, supra, upon which Youngblood was based. In Trombetta, which involved a charge of driving while intoxicated, the defendant was presumed to be

intoxicated if his blood alcohol level was above 0.10 percent. 467 U.S. at 482. The evidence destroyed was the breath sample from which were obtained the test results which the State intended to rely on in proving its case. Id., at 482-483. The missing evidence in Trombetta was thus as important to the State's case as that here. The Court nonetheless held that bad faith must be established in order for the suppression of the test results to be required. Id., at 488-489.

Moreover, other cases applying Trombetta and Youngblood have held in cases involving evidence similar to that here that a defendant must show bad faith in order to establish a due

process violation. In United States v. Belden, 957 F.2d 671 (9th Cir. 1992), where the charge was manufacturing marijuana, the Ninth Circuit held, citing Youngblood, that a showing of bad faith was required where the government had destroyed a number of the marijuana plants. In United States v. McKie, 951 F.2d 399 (D.C. Cir. 1991), the defendant was charged with possession of more than five grams of crack cocaine; bad faith was needed to suppress test results where the crack had been lost. In United States v. Pirre, 927 F.2d 694, 696-697 (2nd Cir. 1991), where the defendant was charged with importation of cocaine, the destruction of part of the cocaine did not result in the suppression of test

results absent bad faith. In United States v. Malbrough, 922 F.2d 458, 463 (8th Cir. 1990), cert. denied, 111 S.Ct. 2907 (1991), a prosecution for manufacturing marijuana, bad faith was required for suppression where most of the marijuana was intentionally destroyed before trial. In United States v. Donaldson, 915 F.2d 612 (10th Cir.1990), where the charge was conspiracy to possess more than 100 kilograms of marijuana, destruction of the marijuana did not result in the suppression of test results absent a showing of bad faith. In United States v. White, 766 F.Supp. 873, 884-885 (E.D. Wash. 1991), a hazardous waste prosecution like the case at bar, the consumption of the waste during testing did not require suppression of the

results without bad faith. In State v. Mabe, 412 S.Ed.2d 386 (S.C. 1991), a case involving trafficking in cocaine, suppression of test results could be based only upon a showing of bad faith. In Commonwealth v. Dennis, 588 A.2d 30 (Pa. 1991), a DUI case, destruction of a blood sample showing blood alcohol level did not require suppression of the test results without bad faith.

These cases are all similar to the instant case because in each the government, in order to make its case, had to introduce test results to prove the identity or chemical make-up of a particular substance which had been destroyed. None of the cases recognized the exception to Youngblood found by the Alabama Supreme Court.

Thus, the decision by the lower court represents a departure from the prevailing interpretation of Trombetta and Youngblood, and creates a split among the courts as to the application of those cases.

Because of division among the courts as to whether bad faith is required for a due process violation in cases involving evidence such as this, the Court should grant certiorari as to this issue.

II. THE DECISION BELOW REGARDING THE DESTRUCTION OF EVIDENCE IN THE HANDS OF A SEPARATE GOVERNMENT CONFLICTS WITH THOSE OTHER JURISDICTIONS ON THIS QUESTION

In the instant case the Supreme Court of Alabama suppressed not only

the results of tests on the samples taken by the state agency, ADEM, but also results based on EPA's samples, even though these later samples were never in the State's possession. Ex parte McRay Gingo, supra, ms. op. at 9. (Appendix C at 32-33).

This holding, which makes the State responsible for the acts of a third party government over which it has no actual control, is inconsistent with what appears to be the general rule that one government has no obligation to turn over evidence in the possession of another government. United States v. Harris, 738 F.2d 1068, 1072 (9th Cir. 1984), cert. denied, 484 U.S. 832 (1987) (no duty on federal prosecutor to turn over tapes possessed by state);

Thor v. United States, 574 F.2d 215, 220-221 (5th Cir. 1978) (no duty on federal prosecutor under Rule 16, F.R.Cr.P. to turn over address book in state possession); United States v. Bermudez, 526 F.2d 89, 100 n. 9 (2nd Cir. 1975), cert. denied, 425 U.S. 970 (1976) (no duty on federal prosecutor under Jencks Act to turn over material in state investigator's file). While these cases do not specifically address the question of whether one government can be held on constitutional grounds to be responsible for the acts of another, they at least imply that this is not the case.

Because of the difference between the holding in the case below and those in other cases regarding the responsibility of a government for evidence in

the possession of a third party, the Court should grant certiorari to decide this issue.

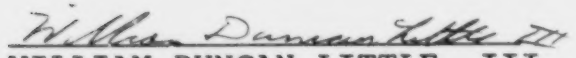
CONCLUSION

As has been shown above, the holding of the Supreme Court of Alabama regarding the two questions discussed above are in conflict with both those of this Court and those of the courts of various other jurisdictions. For

this reason the Court should grant certiorari to address these questions.

Respectfully submitted,

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL



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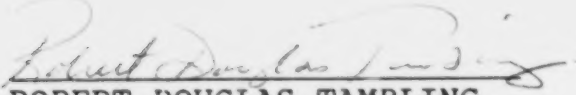

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APPENDIX A

STATE OF ALABAMA	)	IN THE CIRCUIT
	)	COURT OF SHELBY
vs.	)	COUNTY, ALABAMA
	)	
McRAY GINGO, ATLAS INDUSTRIAL PAINTERS, INC., and ROBERT DALE WHITE	)	CASE NUMBERS CC-88-543, CC-89-050, and CC-90-450

ORDER

THE ABOVE CAUSES came on before the Court on the following motions filed by the parties, viz:

Motion for Pre-Trial Determination of Admissability of Evidence
Motion to Dismiss and for Contempt
Motion for Production and Disclosure
Motion to Consolidate
Motion to Suppress and Exclude

which were heard on October 12, 1990. At said hearing appeared counsel for the parties. After considering the

oral arguments of counsel, ore tenus testimony and the briefs of counsel, the Court finds:

1. That there are three Defendants charged with criminal violations of environmental offenses under Title 22 Chapter 30 of the Code of Alabama 1975.

2. That two Defendants, namely McRay Gingo and Atlas Industrial Painters, Inc. were indicted on November 18, 1988. Said Defendants employed the Honorable Frank Head as their attorney who filed Motion for Production and Disclosure on February 15, 1989, which was granted pursuant to Rule 18.1 of A.R.C.P. on February 24, 1989. Said motion sought discovery of all scientific test or experiments made by the State, as well as, andy [sic]

and all tangible evidence in the State's possession, care, custody or control relating to hazardous waste, sludge, drums or objects or other tangible things relevant to the case against said Defendants, and also discovery of any "Brady" material.

3. A true bill was returned on November 18, 1988 against the third Defendant, namely, Robert Dale White, who was arrested March 9, 1990 and now represented by Court appointed counsel, the Honorable William Mathews.

4. That samples were taken in which both the Alabama Department of Environmental Management and the Environmental Protection Agency had when the indictments were issued against the said Defendants.

5. That since the indictments have been returned and since the Court's aforesaid discovery order dated February 24, 1989, all samples have been destroyed through no fault of any Defendants.

6. The State in it's [sic] brief to the Court cited Reed v. State, 401 So.2d 131, 137 for the proposition that test results are in and of themselves sufficient to make out a prima facie case, without the admission of samples on which the tests were conducted. However, this court notes that the testimony of the State Toxicologist went in without objection and as a result thereof, our Criminal Court of Appeals held that a prima facie case was made.

7. That the destruction of the samples in this cause would only allow test results as evidence against the Defendants and the destruction of the evidence does not allow the Defendants access to any potentially exculpatory material.

Accordingly, it is ORDERED and ADJUDGED by the Court:

1. That the test results received by the State in this cause shall not be received in evidence.

2. That all other motions shall be stayed as the State has indicated it will appeal any adverse ruling by this Court.

DONE and ORDERED this 22nd day of February, 1991.

D. Al Crowson
Circuit Judge

APPENDIX B

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1991-92

CR 90-784

State of Alabama

v.

McRay Gingo, a/k/a McRay Jingo;
Atlas Industrial Painters, Inc.;
and Robert Dale White

Appeal from Shelby Circuit Court
CC-88-543; CC-89-050; CC-90-450
JUDGE BOWEN

The Opinion of this Court issued October 25, 1991, is hereby withdrawn. The following becomes the opinion of the Court.

This is an appeal, pursuant to Rule [illegible].A.Crim.P.Temp. (now Rule 15.7,

A.R.Crim.P.), from the pre-trial order of the Circuit Court of Shelby County suppressing the results of tests performed by two different environmental management laboratories upon material alleged to constitute hazardous waste.

In November 1988, McRay Gingo and Atlas Industrial Painters, Inc., were separately indicted. Each indictment contained three counts, which charged: 1) illegally disposing of hazardous wastes at an unpermitted site in Walker County, Alabama, in violation of Ala. Code 1975, §22-30-19(e)(1); 2) unlawfully violating an order issued by the Alabama Department of Environmental Management (ADEM) dated May 28, 1986, which, in effect, required Gingo and Atlas to submit to ADEM a plan for the

proper disposal of certain hazardous wastes stored at the Atlas facility in Pelham, Alabama, in violation of Ala. Code 1975, §22-30-19(e)(6); and 3) unlawfully failing to prepare a hazardous waste manifest for the transportation of the hazardous wastes referred in the second count, in violation of ADEM regulations and Ala. Code 1975, §22-30-19(e)(6). Robert Dale White was separately charged in a three count indictment with: 1) unlawfully transporting hazardous wastes to an unpermitted site in Walker County, Alabama, in violation of Ala. Code 1975, §22-30-19(e)(1); 2) unlawfully accepting and transporting hazardous wastes not accompanied by a hazardous waste manifest, in violation of ADEM

regulations and Ala. Code 1975, §22-30-19(e)(6); and 3) unlawfully transporting hazardous waste without having received an Alabama Hazardous Waste Transport permit from ADEM, in violation of Ala. Code 1975, §22-30-19(e)(6).

The circuit court granted the appellants' motions for production and disclosure and ordered pretrial discovery pursuant to Rule 18.1, A.R.Crim.P.Temp. (now Rule 16.1, A.R.Crim.P.). When it was discovered that samples of the waste material had been destroyed, the circuit court ordered the suppression of the test results of that material.

The pertinent facts are listed in chronological order:

November 26, 1986 - Three or four samples of suspected hazardous wastes were collected by ADEM from 50 drums on a vacant lot in Walker County, Alabama, and transported to the ADEM laboratory in Montgomery for analysis. They were received at the laboratory in December of 1986, R. 106, and analyzed on December 12, 1986. R. 120.

January 1987 - ADEM receives test results. R. 102.

April 23, 1987 - ADEM refers the case to the Alabama Attorney General. R. 99.

April 29 or May 1, 1987 - Samples collected by ADEM disposed of R. 93, 106.

August 6, 1987 - Environmental Protection Agency (EPA) collects four samples from a site on Gardner Road in Walker County. These samples were sent to the EPA environmental management laboratory in Athens, Georgia, and were received there on August 7, 1987. These samples were taken to determine if hazardous waste was present at the site.

At that time, the EPA was proceeding with the matter as a civil case rather than a criminal one. R. 47. The EPA objective was "to get the [site] cleaned up." R. 72.

September 25, 1987 - An EPA administrative order dated September 21, 1987 is sent to appellants Gingo and Atlas.

December 1987 - Pursuant to an administrative order from EPA, appellant Gingo met with EPA representatives in Atlanta, Georgia, to discuss whether he was going to undertake the cleanup. R. 71. This administrative order included the laboratory results and a finding of fact.

January 1988 - EPA removes the material remaining at the Walker County site after appellant Gingo fails to conduct the cleanup.

An investigator from the attorney general's office collects samples from the dump site after learning that the "ADEM samples were no longer available." R. 94. Those samples could not be analyzed or "flash point tested" because the waste was not liquid but solid and "had rubberized. [I]t had been exposed to the climate for a long period of time." R. 95.

Although there was no testimony concerning the date these samples were collected, it must have been before the site was cleared by the EPA.

November 15, 1988 - Indictments are returned against appellants Gingo and Atlas.

November 18, 1988 - An indictment is returned against appellant White.

February 15, 1989 - Appellants Gingo and Atlas file a motion for production and disclosure. This motion specifically requested, among other things, the production of "[a]ny and all tangible evidence in the State's possession, care, custody or control relating to or consisting of . . . paint, hazardous waste, sludge, drums . . . ." CR. 12. The motion also requested "[a]ny and all . . . paint, sludge, hazardous waste, drums ... possessed or contained in the files of Alabama Department of Environmental Management, Shelby County Sheriff's Department, Walker County Sheriff's Department, Alabama Attorney General's Office . . . ." CR. 15

February 24, 1989 - Motion granted pursuant to Rule 18.1, A.R.Crim.P.Temp.

March 9, 1989 - By letter of this date, the Alabama Attorney General notified appellant Gingo that the "[s]samples of hazardous waste material previously analyzed by the ADEM laboratory . . . no longer exist." R. 57.

August 23 or 24, 1989 - EPA issues order to dispose of samples. R. 54, 86.

October 12, 1990 - Evidentiary hearing held on State's motion for pretrial determination of admissibility of evidence.

February 22, 1991 - The circuit court issued an order that "the test results received by the State in this cause shall not be received in evidence." CR. 70. In that order, the court found:

> "4. That samples were taken in which both the Alabama Department of Environmental Management and the Environmental Protection Agency had when the indictments were issued against the said Defendants.
>
> "5. That since the indictments have been returned and since the Court's aforesaid

> discovery order dated February 24, 1989 all samples have been destroyed through no fault of any Defendants.
>
> ". . . .
>
> "7. That the destruction of the samples in this cause would only allow test results as evidence against the Defendants and the destruction of the evidence does not allow the Defendants access to any potentially exculpatory material." CR. 69-70.

The Due Process Clause of the Constitution of the United States did not require the suppression of the test results. "[W]hen we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of

which might have exonerated the defendant," the good or bad faith of the State is relevant. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Youngblood, 488 U.S. at 58, 109 S.Ct. at 337. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or

destroyed." Youngblood, 488 U.S. at 57 n. ___, 109 S.Ct. at 337 n. ___. See also, United States v. Galvan-Garcia, 872 F.2d 638, 641 (5th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 164 (1989). See generally, W. LaFave and J. Israel, 2 Criminal Procedure §195 (Supp. 1991).

The year before Youngblood was decided, the Alabama Supreme Court reached a contrary result in Ex parte Dickerson, 517 So.2d 628 (Ala. 1987), when it held that "under controlling authority, the good faith or bad faith of the prosecution is irrelevant." Dickerson, 517 So.2d at 630 (emphasis added). In Dickerson, the Court held that the intentional destruction by the police of evidence which might have

been favorable to the defendant "substantially impaired the defendant's ability to establish the favorable nature of the evidence and violated the defendant's right to due process." 517 So.2d at 631.

However, the "controlling authority" cited in Dickerson was all federal case authority. The only state case cited was Kennedy v. State, 472 So.2d 1106 (Ala.), cert. denied, 474 U.S. 975 (1985), which also relied only on federal case authority.

This Court conscientiously honors the statutory command that "[t]he decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals." Ala. Code 1975, §12-3-16. See Hampton v. State, 455 So.2d 149, 152 (Ala.Cr.App. 1984).

However, as was recognized in Minniefield v. State, 47 Ala.App. 699, 705, 260 So.2d 607 (1972): "At all events we are bound by the opinions of the Supreme Court of Alabama even on Federal questions unless the Supreme Court of the United States expressly or by necessary implication has ruled to the contrary." We conclude that Youngblood overruled Dickerson by necessary implication.[1]

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[1]It does appear that in Duncan v. State, 575 So.2d 1198, 1204 (Ala.Cr.App. 1990), cert. denied, 575 So.2d 1208 (Ala. 1991), this Court erroneously assumed that Youngblood and Dickerson were consistent. However, because Duncan is presently on remand to the trial court after and pending direct appellate review by this Court, we will not re-examine on this occasion the conclusion reached there.

We further hold that under the principles of Youngblood, the destruction of the test samples and the waste material located at the dump site did not deny the defendants due process of law because those defendants have failed to show any "bad faith" on the part of the prosecution. All of the evidence was destroyed according to standard procedure. Furthermore, there is only the vaguest of speculation to support the contention that a third test of the waste material might prove that it was non-hazardous. It must be remembered that the waste material was independently collected and tested by two different laboratories -- one federal and one state. There has not even been the contention that there was

any conflict or discrepancy between the test results.

With regard to the results of the test conducted by the EPA, it must be observed that while it could be argued that the State had possession of the dump site from which the samples were taken by the EPA, the State did not have control over the samples taken by the EPA or over the results of the test conducted by the EPA. "Materials not possessed by the government cannot be suppressed within the meaning of Brady [v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)]." United States v. Rodriguez, 917 F.2d 1286, 1291 (11th Cir. 1990), affirmed on rehearing as to this ground and vacated in part on other grounds, 935 F.2d 194 (11th Cir. 1991).

The order of the circuit court dated February 22, 1991, suppressing the results of chemical tests of suspected hazardous waste material is reversed. This cause is remanded for further proceedings not inconsistent with this opinion.

APPELLEE'S APPLICATION FOR REHEARING OVERRULED;
STATE'S APPLICATION FOR REHEARING GRANTED;
ORIGINAL OPINION WITHDRAWN;
OPINION SUBSTITUTED;
REVERSED AND REMANDED.

All Judges concur.

APPENDIX C

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1991-92

1910360

Ex parte McRay Gingo, et al.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CRIMINAL APPEALS
(Re: State of Alabama

v.

McRay Gingo, a/k/a McRay Jingo;
Atlas Industrial Painters,Inc.;
and Robert Dale White)

(Shelby Circuit Court, CC-88-543;
89-050)

JUSTICE KENNEDY

We granted certiorari review in this case to determine whether the State erred in destroying or allowing the destruction of samples of allegedly hazardous waste.

On November 26, 1986, four officials of the Alabama Department of Environmental Management ("ADEM") obtained three or four pints of waste from fifty 55-gallon drums in Walker County. In December of 1986, the samples were tested and found to be hazardous waste because of the characteristic of "ignitability" as defined by ADEM regulations. On April 23, 1987, the director of ADEM notified the Attorney General's Office of the findings and requested that the office conduct an investigation into to the dumping of allegedly hazardous waste in Walker County. The samples were then disposed of on April 29, 1987, or May 1, 1987. Although the ADEM laboratory director knew that the samples were

related to a possible criminal case, he disposed of the samples, because ADEM had no standard operating procedure for keeping evidence in criminal cases. (R.T. 28-29). We note that this was only the second case that ADEM had submitted to the Attorney General's Office. Since then, ADEM has established a procedure for maintaining samples related to a criminal case.

On August 5, 1987, ADEM notified the Environmental Protection Agency ("EPA") of the dumping of allegedly hazardous waste. The purpose of the EPA's involvement was to remove any hazardous waste and to identify the responsible parties in order to hold them civilly liable for the costs of the removal. The EPA collected samples

from the drums and determined that the samples were hazardous because of the characteristic of "ignitability" as defined by EPA regulations. On September 25, 1987, the EPA sent the defendants an administrative order and in December 1987, the defendants met with an EPA official concerning the EPA's findings. On August 23 or 24, 1989, the EPA destroyed the samples, in accordance with its standard procedure in civil cases. An EPA official stated that it was standard procedure to retain samples collected in the course of an EPA criminal investigation. The official stated that although she knew of an ongoing state investigation, she did not know whether it was civil or criminal in nature and that the State had not requested that the EPA keep the

samples. (R.T. 69, 53). She also stated that had the EPA known of the trial court's discovery order, the samples would not have been destroyed. (R. T. 63).

At some point, the Attorney General's Office took samples of the waste, but the waste had solidified and the samples could not be tested.

Two of the defendants, McRay Gingo and Atlas Industrial Painters, Inc., were indicted and charged with: (1) disposing of hazardous waste at an unpermitted site in Walker county, in violation of §22-30-19(e)(1), Ala. Code 1975; (2) violating an order issued by ADEM requiring that the defendants submit a plan to ADEM for the proper disposal of certain hazardous wastes,

in violation of §22-30-19(e)(6), Ala. Code 1975; and (3) failing to prepare a hazardous waste manifest for the transportation of certain hazardous waste, in violation of ADEM regulations and §22-30-19(e)(6), Ala. Code 1975.

The other defendant, Robert Dale White, was separately charged with: (1) transporting hazardous wastes to an unpermitted site in Walker County, Alabama, in violation of §22-30-19(e)(1), Ala. Code 1975; (2) accepting and transporting hazardous wastes not accompanied by a hazardous waste manifest, in violation of ADEM regulations and §22-30-19(e)(6), Ala. Code 1975; and (3) transporting hazardous waste without having an Alabama hazardous waste transport

permit from ADEM, in violation of §22-30-19(e)(6), Ala. Code 1975.

On February 15, 1989, the defendants filed a motion for production and disclosure of all Brady v. Maryland, 373 U.S. 83 (1963), material and evidence discoverable pursuant to Rule 18, A.R.Crim.P.Temp. Specifically, the defendants requested production of "any and all tangible evidence in the State's possession, care, custody or control relating to or consisting of ... paint, hazardous waste, sludge, drums." (C.R. 3). The trial court granted the motion, pursuant to Rule 18.1, A.R.Crim.P.Temp. On March 9, 1989, the State notified the defendants that all of the samples had been destroyed. The State then filed a motion for a pretrial determination of

the admissibility of evidence regarding the EPA and ADEM test results relating to the samples, for the purpose of using the test results at trial. (C.R. 23-25). After a hearing, the trial court suppressed evidence of the test results. In its order, the trial court stated, in pertinent part, as follows:

> "That two Defendants, namely, McRay Gingo and Atlas Industrial Painters, Inc., were indicted on November 18, 1988. Said Defendants employed the Honorable Frank Head as their attorney who filed a Motion for Production and Disclosure on February 15, 1989, which was granted pursuant to Rule 18.1 of A.R.C.P. on February 24, 1989. Said motion sought discovery of all scientific tests or experiments made by the State, as well as any and all tangible evidence in the State's possession, care, custody or control relating to hazardous waste, sludge, drums or objects or other tangible things relevant to

the case against said Defendants, and also discovery of any Brady material.

"....

"That samples were taken ... which both the Alabama Department of Environmental Management and the Environmental Protection Agency had when the indictments were issued against the said Defendants.

"That since the indictments have been returned and since the Court's aforesaid discovery order dated February 24, 1989, all samples have been destroyed through no fault of any Defendants.

The State in its brief to the Court cited Reed v. State, 401 So.2d 131, 135, for the proposition that test results are in and of themselves sufficient to make out a prima facie case, without the admission of samples on which the tests were conducted. However, this Court notes that the testimony of the State Toxicologist went in without objection and [that] as a result thereof, our [Court of Criminal Appeals] held that a prima facie case was made.

> "The destruction of the samples in this cause would only allow test results as evidence against the Defendants and the destruction of the evidence does not allow the Defendants access to any potentially exculpatory material."

(C.R. 69-70).

On appeal, the Court of Criminal Appeals reversed the trial court's order suppressing evidence of the test results. That court stated:

> "[W]hen we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant, 'the good or bad faith of the State is relevant. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). '[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve poten-

> tially useful evidence does not constitute a denial of due process of law.' Youngblood, 488 U.S. at 58, 109 S.Ct. at 337."

State v. Gingo, [Ms. 90-784, November 27, 1991] ___ So.2d ___, ___ (Ala.Crim.App. 1991). The court stated, in regard to the samples, that "all of the evidence was destroyed according to standard procedure." ___ So.2d at ___. The court also found that the State did not have "control" over the samples taken by the EPA and held, therefore, that the results of tests on those samples would not be subject to suppression under the terms of Brady v. Maryland, 373 U.S. 83 (1963).

We disagree with the Court of Criminal Appeals, because we conclude that the trial court correctly suppressed the evidence of the test results relating to the destroyed samples, under the facts of this case. The facts of this case are substantially different from those in Youngblood, cited by the Court of Criminal Appeals. In Youngblood, a 10-year-old boy was molested and sodomized. The police failed to refrigerate the boy's clothing, which had two semen stains on it. The police did refrigerate a "sexual assault kit," which contained a swab of semen from the boy's rectum. However, there was not enough semen present on the swab for accurate tests. At trial, the State presented evidence that the boy

had identified the defendant as his attacker. The State did not introduce any evidence of the assault kit or the clothing in its case-in-chief. An expert for the defendant testified that the defendant may have been completely exonerated by tests on the clothing if the clothing had been refrigerated. The Supreme Court held that to show a due process violation, the defendant must show bad faith on the part of the police in failing to preserve the potentially exculpatory evidence.

In Youngblood, the Supreme Court cited California v. Trombetta,a 467 U.S. 479 (1984), which involved a drunk driving prosecution.

> "The defendants sought to suppress the test results [indicating the concen-

> tration of alcohol in the defendants' blood] on the ground that the State had failed to preserve the breath samples used in the test. We rejected this argument for several reasons: first, 'the officers here were acting in 'good faith and in accord with their normal practice,' [Trombetta] at 488, 104 S.Ct. at 2533, quoting Killian v. United States, 368 U.S. 231, 242, 82 S.Ct. 302, 308, 7 L.Ed.2d 256 (1961); second, in the light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim, 467 U.S., at 489, 104 S.Ct., at 2534; and third, even if the samples might have shown inaccuracy in the tests, the defendants had 'alternative means of demonstrating their innocence.' Id., at 490, 104 S.Ct., at 2534."

Youngblood, 485 U.S. 51 (1988).

In the instant case, there is no evidence available to refute the test results, because the samples have been destroyed. The evidence necessary to convict the defendants of hazardous waste violations is the test results. The test results were part of the State's case-in-chief, i.e., the State had to use those tests results to carry its burden of proving the hazardous waste violations. In Trombetta, the police destroyed the breath samples according to a standard procedure. In the case at bar, there was no procedure for keeping the samples. In Trombetta, both defendants were stopped on a suspicion of drunk driving and then were given the breath test. In the case at bar, the defendants were indicted solely because of the tests done on the samples.

"[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Youngblood, 488 U.S. at ___, 109 S.Ct. at 337. "The presence or absence of bad faith by the police for the purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Youngblood, 488 U.S. at ___ (footnote), 109 S.Ct. at 337 (footnote), citing Napue v. Illinois, 360 U.S. 264, 269 (1959).

Although to show bad faith, for the purpose of showing due process violation, the defendant must show that the State had knowledge of the excul-

patory value of the destroyed evidence, "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." Youngblood, 488 U.S. at ___, (Stevens, J., concurring in the result). We think that this is such a case.

The State, on April 23, 1987, had knowledge of the results of ADEM's tests on the samples. A week later, ADEM's samples were destroyed. ADEM had no standard operating procedure for "what to do with evidence obtained in criminal cases." (R.T. 28-29). ADEM notified the EPA of the waste on August 5, 1987, and on August 6, 1987, the EPA

took samples of the waste. On February 15, 1989, the defendants filed a motion for production and disclosure, which was granted on February 24, 1989. On March 9, 1989, the State informed the defendants that the samples no longer existed. On August 23 or 24, 1989, six months after the discovery order had been entered, the EPA destroyed its samples. Although the EPA normally kept samples that were involved in a criminal case, EPA was not informed that these particular samples related to a criminal case. The Court of Criminal Appeals determined that the State did not have control over the samples taken by the EPA. However, the State was planning to use the EPA test results against the defendants at trial. Under the facts of this case,

we think that it would be fundamentally unfair to allow the State to use the results of the EPA or ADEM tests on the destroyed samples.

REVERSED AND REMANDED.

Hornsby, C. J., and Maddox, Shores, Adams, Stegall, and Ingram, JJ., concur.

ADDENDIX D

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT
OF ALABAMA
July 10, 1992

1910360 Ex parte McRay Gingo and Atlas Industrial Painters, Inc. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (Re: State of Alabama v. McRay Gingo, a/k/a McRay Gingo; Atlas Industrial Painters, Inc.; and Robert Dale White) (90-784)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM- Hornsby, CJ., Maddox, Shores, Steagall, Kennedy and Ingram, JJ., concur.

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(3)

Supreme Court, U.S.
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No. 92-634

IN THE

Supreme Court Of The United States

October Term, 1992

STATE OF ALABAMA,

Petitioner,

v.

McRAY GINGO and
ATLAS INDUSTRIAL PAINTERS, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the Supreme Court of Alabama that certain scientific test results were inadmissible as evidence at trial after State of Alabama authorities destroyed or allowed destruction of all evidence against Respondents is so fundamentally wrong and in irreconcilable conflict with decisions reviewable by this Court that a writ of certiorari should be granted.

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STATEMENT OF THE CASE

INTRODUCTION

The Respondents, McRay Gingo and Atlas Industrial Painters, Inc., were indicted for improperly disposing of old highway striping paint, and not complying with administrative requirements and directives of the Alabama Department of Environmental Management (ADEM). The alleged illegalities stem from the State's claim that the paint was hazardous waste, as defined by ADEM regulations, due to an "ignitability" characteristic which required specialized testing for identification of such. The unlawful quality of the paint could not be determined from simple observation, and tests were necessary for the State to meet its burden of proof.

Shortly after the Respondents were arraigned, a comprehensive discovery motion was filed pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and Temporary Rule 18 of the *Alabama Rules of Criminal Procedure*, specifically requesting production of the paint, hazardous waste, tangible evidence, "Brady" material, etc., and information pertaining to said items. The trial court granted the motion, and thereby ordered production (C.R. 10-16). The State responded by stating that the evidence at the ADEM laboratories had been destroyed; however, other paint sample evidence being kept at the EPA laboratory was not produced, and was destroyed approximately six months after the discovery order. The State thereafter informed that it intended to use the test results obtained at the EPA laboratories as evidence in the case.

EVIDENCE

The trial court conducted a pre-trial admissibility of evidence hearing in accordance with the Alabama Rules of Criminal Procedure. At the hearing, an ADEM investigator testified that he was aware a criminal prosecution might result upon first learning of the paint drums, and he engaged in a number of conversations about criminal prosecution

with ADEM officials before any of the evidence samples were destroyed. He testified that ADEM had no standard operating procedure for what to do with evidence obtained in criminal cases (R.T. 28-29). He stated he was aware from his experience in civil cases that alleged violators often want to perform independent tests upon government evidence as government tests are not infallible (R.T. 37, 39). He said he had the authority to have prevented destruction of the ADEM samples.

The ADEM investigator further said that he notified the Environmental Protection Agency (EPA) of the evidence site for purposes of clean-up. He testified he knew that after clean-up, the EPA would transport the material to a hazardous waste facility for treatment, storage and disposal. He acknowledged that ADEM had a good professional, working relationship with the EPA (R.T. 31-34).

The ADEM lab director testified that evidence samples remained in his care about four and one-half or five months, and were disposed of about a week after the case was referred to the Attorney General's Office for prosecution. He admitted he heard the samples were collected in connection with a possible criminal or court case, and he had authority to preserve them, but did not do so.

An EPA official testified that the evidence samples acquired by the EPA would have been preserved if the State had so requested. She also testified that the EPA would have preserved the evidence samples as part of its standard operating procedure if she had been made aware of the state court discovery order (R.T. 63). She further testified that the EPA's standard operating procedure is to save evidence in criminal cases (R.T. 52). She said she was aware of this case, but did not know whether it was civil or criminal. She recalled communications with the ADEM investigator, and shared the EPA test results with ADEM.

The EPA lab chief testified that the lab preserves test samples upon request of the referral party. However, regardless of any requests, test samples will not be destroyed if the

lab is made aware that such are involved in a criminal proceeding (R.T. 79-80). The lab chief identified the evidence samples at the EPA laboratory as having been destroyed approximately six months after the trial court's discovery order (R.T. 86).

PREVIOUS COURT DECISIONS

The trial court found that all evidence had been destroyed through no fault of the Respondents, and ordered the test results excluded as trial evidence. The order is reproduced in Appendix "A" to the Petition for Writ of Certiorari. The trial court did not state the specific basis in law for its action, i.e., whether it was ruling upon U.S. or State Constitutional grounds, or whether it was simply ruling pursuant to authority granted by Rule 18.5 (a), *A.R.Crim.P.Temp.* (now Rule 16.5, *A.R.Crim.P.*), which provides

> "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, or with any other order issued pursuant to this rule, the court may ... prohibit the party from introducing evidence not disclosed; or enter such order as the court deems just under the circumstances."

The State asserts in brief the trial court made a definite finding of no bad faith. That is not correct. The Respondents vigorously contended the State had acted in bad faith, and the trial court suppressed the evidence after considering such claim. The court simply made no specific comment in regard thereto in its written decision.

The State appealed the ruling of the trial court, and the Alabama Court of Criminal Appeals reversed. The Respondents petitioned for writ of certiorari, and the Supreme Court of Alabama reversed the Court of Criminal Appeals. Argument was presented to the Court that the test results could be suppressed on the basis of federal due process constraints, state due process constraints, or the discretionary au-

thority provided the trial court by the Rules of Criminal Procedure. The Supreme Court reviewed *Arizona v. Youngblood*, 488 U.S. 51 (1988), and *California v. Trombetta*, 467 U.S. 479 (1984), applied the analysis set forth in those cases, and determined that suppression of the test results was appropriate. The Court does not specifically state that its decision is based upon the 14th Amendment of the United States Constitution. However, the Court held that *under the facts of this case*, it would be fundamentally unfair to allow the State to use test results of the destroyed evidence at trial. The Court's opinion is reproduced in Appendix "C" of the Petition for Writ of Certiorari.

REASONS THE WRIT SHOULD BE DENIED

I. THE ALABAMA SUPREME COURT OPINION DOES NOT CONFLICT WITH UNITED STATES SUPREME COURT CASES.

In the Alabama Supreme Court's narrowly written opinion, the Court states on several occasions that under the facts of this case, it would be fundamentally unfair to allow the State to use test results of the destroyed evidence. The Court determined that factors considered important in *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *California v. Trombetta*, 467 U.S. 479 (1984), were not present in this case. The facts in this case were markedly different, the interests of justice weighed differently, and a different result was justified. However, the analysis applied was essentially the same. The Court identified several instances of blatant misconduct by the State which it refused to tolerate, and which created an impossible situation for the Respondents. The quality of the State's conduct and the degree of prejudice to the Respondents were such that exclusion of evidence was warranted. See *United States v. Belden*, 757 F. 2d 671 (9th Cir. 1992). Bad faith was clearly evident, as the Respondents have claimed from the outset.

In *Arizona v. Youngblood, supra*, the Defendant was convicted of child molestation, sexual assault and kidnapping. The thrust of the State's case was the victim's eyewitness testimony identifying his assailant. The Defendant complained that if police had refrigerated the clothes of the victim, he could have performed tests on semen stains that might have exonerated him.

This Court found no due process violation. The Court emphasized that police had acted in accordance with their normal or standard procedure in seizing the child's clothing, and having a physician administer a sexual assault kit. The Court also stressed that the State did not offer the clothing, or tests thereon, as evidence in its case-in-chief, but chose to prosecute with other apparently convincing evidence. The Court indicated that police had acted within reasonable bounds in preserving evidence, and stated that police had no constitutional duty to perform any particular tests. The Court noted that police did not conceal anything from the Defendant, and in fact, made the clothing, sexual assault kit, and other physical evidence available to the Defendant. The Court ultimately concluded that the Defendant did not show any bad faith by law enforcement, and the failure to preserve the potentially useful evidence did not constitute a denial of due process as guaranteed by the 14th Amendment of the United States Constitution.

In *California v. Trombetta, supra*, various defendants were charged with driving under the influence of alcohol after being stopped by law enforcement officers for suspicion of drunk driving. They claimed they were denied due process because breath samples used in an Intoxilyzer machine were not preserved. The Court recognized as important the fact that officers acted in good faith and in accord with normal practice in not keeping the breath samples. Presumably, evidence of guilt or innocence could also be presented from the observations of the officers or other persons present. The Court pointed out that the Defendants had alternative means of demonstrating their innocence. Further, the Court stated

that the duty imposed on states to preserve evidence must be limited to that which might be expected to play a significant role in the suspect's defense. The Court analyzed a number of safeguards, and concluded it was highly unlikely that preserved samples would have exculpated the Defendants.

The Alabama Supreme Court reviewed the factors deemed significant in *Youngblood* and *Trombetta*, and found them absent or weighing favorably for the Respondents in this case. The standard procedure for the EPA was to maintain evidence samples in criminal cases — but the evidence kept at the EPA laboratory in this case was destroyed *contrary* to standard procedure. The EPA took the evidence at the instance of the State during the course of a State investigation, and EPA officials testified it would not have been destroyed if the State had so requested. Further, destruction of the evidence in violation of standard procedure occurred *six months after* the trial court had entered its discovery order. The EPA officials also testified that the evidence would not have been destroyed if they had been informed of the discovery order. The State declared that it intended to use the EPA test results against the Respondents. The State argues that it had no control over the EPA. However, the Alabama Supreme Court found untenable the State's position that it could work in such close contact with the EPA and use the EPA test results at trial, but could not obtain preservation of the evidence samples or compliance with the discovery order.

The Alabama Court also acknowledged that the evidence at the ADEM laboratory was not destroyed in accordance with standard procedure, as ADEM had no standard procedure concerning evidence in criminal cases. ADEM officials were aware of the possible criminal case, knew the Respondent might want the samples for independent testing, admitted the potential for errors in testing, and yet still disposed of the samples after the case was assigned to the prosecuting authority. Lack of any policy where such is standard for similar agencies, e.g., the EPA, was inexcusable. Considering the circumstances, the Court refused to permit the State to act unreasonably to the extreme prejudice of the Respondents. The

Court did note that ADEM now has a procedure for maintaining evidence in criminal cases.

The Alabama Supreme Court also considered the fact that the test results were an essential part of the State's case-in-chief. The Court notes that the State had to use the test results to carry its burden of proving the hazardous waste violations. The test results were not just corroborative evidence — the test results were *the* evidence that the paint was hazardous waste. The test results were not just tangentially related to the case, they don't just confirm what could be proven by other means, they were the requisite proof for conviction. With all physical evidence having been destroyed and no way to independently check, verify or refute the alleged unlawful nature or chemical composition of the said evidence, the Respondents were left in an extremely unfair and defenseless position. The Supreme Court concluded that was unjust.

In *Youngblood* and *Trombetta*, the defendants were arrested or stopped because of other incriminating evidence. The Alabama Court notes that the Respondents were indicted solely because of the tests done on the samples. The State failed to act reasonably in not preserving the evidence, and the Respondents have no real alternative means to demonstrate innocence. The destroyed evidence was material from the outset, and should certainly have been expected to play a significant role in the Respondents' defense, and State officials recognized that fact. The conduct of the State constituted bad faith.

The destroyed evidence is so critical to the Respondents as to make a criminal trial fundamentally unfair. See *Youngblood*, 488 U.S. at 61, (*Stephens, J.*, concurring in the result). The Alabama Supreme Court agrees. However, the Court's opinion closely follows and incorporates the analysis set forth in the *Youngblood* and *Trombetta* majority opinions in reaching the proper result in this case. The State's suggestion that the Supreme Court of Alabama has conceived some unfounded and unsupported exception to due process law is without merit.

II. THE ALABAMA SUPREME COURT OPINION DOES NOT CONFLICT WITH FEDERAL AND STATE CASES.

The State cites several federal and state cases which it says conflict with the decision by our state Supreme Court. The State's contention is wrong. While it is true that no due process violations were found in the cited cases, the underlying facts and policy considerations were substantially different therein.

In *United States v. Belden, supra*, police cut 1100-1200 marijuana plants at the ground level in accordance with routine procedure rather than digging up the plants by the roots. The plants were available for inspection by the defendant, and the defendant had access to a video walk-through of the grow. The Ninth Circuit said that the circumstances did not indicate bad faith, and the quality of the government's conduct and the degree of prejudice to the defendant did not mandate exclusion.

In *United States v. McKie*, 951 F. 2d 399 (D.C. Cir. 1991), certain crack cocaine and its packaging disappeared somewhere between the DEA laboratory and the trial court property room. The court noted that the drugs were apparently available to the defendant for independent testing before trial. Additionally, the government established a chain of custody from the crime scene to the lab, and the chemist was available to testify. The trial court specifically found a lack of bad faith. The court did not think the defendant was prejudiced or that the lost evidence was likely exculpatory. The court could not say that the trial court was clearly erroneous in its ruling, or that it committed an abuse of discretion in its control of the proceedings before it.

In *United States v. Pirre*, 927 F. 2d 694 (2nd Cir. 1991), the court ruled that due process was not violated by destruction of five of fifteen cocaine packages due to an administrative storage concern. Testimony was presented that the destroyed packages were similar to those that remained, and the defendant never sought to test or examine the remaining evidence. Further, the court noted that at trial, the defendant seemed

to admit, and certainly did not dispute, the later contested amount of cocaine.

In *United States v. Malbrough*, 922 F. 2d 458 (8th Cir. 1990), police seized numerous marijuana plants, and only destroyed those plants not randomly selected and used as test samples. The marijuana plants that were destroyed were done so pursuant to a court order and a specific state statute. At trial, the defendant admitted growing marijuana. The court found there was no bad faith or due process violation in the case.

In *United States v. Donaldson*, 915 F. 2d 612 (10th Cir. 1990), marijuana was destroyed by DEA agents and the defendants contested its weight at the sentencing hearing. In *United States v. White*, 766 F.Supp. 873 (E.D. Wash. 1991), hazardous waste pesticides were destroyed, although samples remained available for testing by the defendant. The courts found no due process violations.

In *United States v. Mabe*, 412 S.E. 2d, 386 (S.C. 1991), cocaine was destroyed after the defendant entered a plea of guilty to trafficking in cocaine. Subsequent thereto, the defendant was successful in obtaining post conviction relief, and the guilty plea was vacated. The court declared that the cocaine appeared to be destroyed in reliance upon the defendant's guilty plea, and in accordance with normal procedure, and hence there was no denial of due process.

In *Commonwealth v. Demis*, 588 A. 2d 30 (Pa. Super. 1991), a blood sample was destroyed in a driving under the influence of alcohol case. State law provided that the defendant had a right to have a physician administer an additional test, but not re-test the original sample. Also, the defendant did not allege the sample was exculpatory or that evidence could not reasonably be obtained by other means. The court found no due process violation.

The State also argues that it cannot be held responsible for destruction of the paint samples left at the EPA laboratory. However, a number of courts have refused to allow the prosecution to utilize evidence not furnished to the defendants where the prosecution claimed that said evidence was actually

in the possession of some other governmental agency. As stated in *United States v. Trevino*, 556 F. 2d 1265, 1272 (5th Cir. 1977), a contrary holding would enable the prosecutor "to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." That statement was echoed in *Martinez v. Wainwright*, 621 F. 2d 184 (5th Cir. 1980), where the Court held that the failure to furnish a copy of the defendant's "rap sheet", retained by the medical examiner after specific request, violated the defendant's due process rights.

In *United States v. Bryan*, 868 F. 2d 1032 (9th Cir. 1989), the Court vacated and remanded a mail fraud conviction for failure to produce documents outside Oregon and/or in the possession of federal investigatory agencies. The Court stated "If a federal prosecutor has knowledge of and access to exculpatory information as defined in *Brady* and its progeny that is outside the district, then the prosecutor must disclose it to the defendant." *Id.* at 1037. "The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." *Id.* at 1036.

In *Yanetta v. State*, 320 So. 2d 23, 24 (Fla. 3rd Dist. Ct. App. 1975), the Court declared that a defendant is "properly allowed discovery as to the criminal records of the State's witnesses to the extent that the information is in the actual or constructive possession of the State, not limited to that in the physical possession of the State Attorney's office, *and including data obtainable from the FBI.*"

The State cites three cases in support of its position, but they are inapposite here: *United States v. Harris*, 738 F. 2d 1068 (9th Cir. 1984) (non-disclosed tapes bore only incidentally on merits of case, and no plain error in trial court's ruling); *Thor v. United States*, 574 F. 2d 215 (5th Cir. 1978) (no abuse of discretion by trial court in failing to subpoena address book pursuant to Fed. R. Crim. Proc. where very small likelihood that persons could be located, and address book

was not considered evidentiary pursuant to rules); *United States v. Bermudez*, 526 F. 2d 89 (2nd Cir. 1975) (alleged new evidence would not have materially benefited defendant, and said evidence had been available to counsel in another proceeding). The involvement of ADEM and the testimony of EPA officials in this case, unquestionably demonstrate that the state could and should have prevented destruction of the evidence samples maintained at the EPA lab.

CONCLUSION

The petitioner does not raise any "certworthy" questions that justify the granting of a writ of certiorari to the Supreme Court of Alabama. The petition does not present this court with any significant conflict with the decisions of this court or those from other jurisdictions, fundamental error below has not been demonstrated, and no other compelling reason has been provided to grant the writ. Consequently, the petition is due to be denied.

Respectfully submitted this 7th day of December, 1992.

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